IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
Plaintiffs,	)	**Civil Action No.: 3:06-cv-224-WKW**
v.	)	
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW the Plaintiffs Macon County Investments, Inc. ("MCI") and Reach One, Teach One of America, Inc. ("Reach One, Teach One"), hereinafter collectively referred to as "the Plaintiffs", and hereby file their Response in Opposition to the Defendant's Motion to Dismiss. The Plaintiffs state the following:

STANDARD OF REVIEW

The threshold that must be met to survive a Motion to Dismiss is "exceedingly low". *Ancata v. Prison Health Services, Inc.,* 769 F.2d 700, 703 (11th Cir.1985). When considering the Defendant's Motion to Dismiss, this Court must give deference to the Plaintiffs' assertion of the facts and accept those facts and "all reasonable inferences" as being true. *Stephens v. Dep't of Mental Health and Human Serv.*, 901 F.2d 1571, 1573 (11^{th} Cir. 1990); *see also Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.,* 711 F.2d 989, 994-95 (11th Cir. 1983) (stating that in ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff). Further, the Court should only dismiss a complaint " if no relief could be granted under any set of facts that could be proved consistent with the allegations". *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).

In addition to requesting a dismissal of the Plaintiffs' equal protection claims under Rule 12(b) (6), the Defendant Sheriff David Warren ("hereinafter referred to as "the Defendant Sheriff") also asserts that the Plaintiffs lack standing to pursue this action. The Plaintiffs have the same burden of proof to survive these standing contentions as it does the Defendant's arguments against their equal protection claims. "[E]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. ***with the manner and degree of evidence required at the successive stages of the litigation***." *Florida Public Interest Research Group v. EPA*, 386 F.3d 1070, 1083 (11th Cir. 2004) (emphasis added; internal citations omitted). As such, the Plaintiffs' threshold for surviving the Defendant's standing claims are also "exceedingly low". *See Ancata*, 769 F.2d at 703.

FACTUAL ALLEGATIONS

When reviewing MCI and Reach One, Teach One's Complaint, the following allegations must be accepted as true. The State of Alabama allows for the Amendments to its Constitution which only effect a certain County. Through this type of Amendment, or local legislation, the Alabama Legislature authorized the operation of bingo facilities in Alabama. Amendment 744 was ratified by the Legislature, and it governs the operation of bingo gaming in Macon County. The Amendment provides, in pertinent part, that "the operation of bingo games for prizes or money by nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in Macon

County." *See* Ala. Const. (1901) Amend. 744. Further, the Amendment provides that the non-profit organization may enter into an agreement with an individual, firm, or a corporation to operate the facility.

> "A nonprofit organization may enter into a contract with any individual, firm, association, or corporation to have the individual or entity operate bingo games or concessions on behalf of the nonprofit organization. A nonprofit organization may pay consulting fees to any individual or entity for any services performed in relation to the operation or conduct of a bingo game."

Ala. Const. (1901) Amend. 744 (4). The Legislature placed no limit on the number of licenses that can be issued or facilities that can be authorized to operate gaming in Macon County.

Amendment 744 also states that the Sheriff of the County shall be responsible for promulgating the rules regarding the licensing and operation of the bingo facilities. Pursuant to Amendment 744, the Defendant Sheriff promulgated "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County" in December of 2003. At that time, the Rules stated that ***any non-profit organization*** could make an application for a Class B Bingo license and that the location of the facility, including the land, building and improvements, had to be at least ***$5 million in value***. The Defendant Sheriff has issued only one Class B Bingo facility license under these Rules. That facility is currently operating in Macon County.

Six (6) months later, on June 2, 2004, the Defendant Sheriff promulgated the "First Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama." The First Amended Rules provide that before a Class B Bingo License can be granted a minimum of fifteen (15) non-profit organizations must submit an application and that the facility and location had to be at least $15 million in value. The Sheriff has issued no additional Class B Bingo licenses under the First Amended Rules.

On January 1, 2005, again six (6) months after the amending of the First Amended Rules, the Defendant Sheriff issued a "Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama." The Second Amended Rules stated that at no time shall there be more than sixty (60) Class B Licenses in Macon County, Alabama. Upon information and belief, there are currently fifty-nine (59) Class B licenses issued in Macon County, Alabama only to the original and sole facility. However, there have been no additional Class B Bingo licenses issued under the Second Amended Rules. The only reasonable inference for the change in the rules was to eliminate the ability of new applicants to meet them.

On or about July 25, 2005, Reach One, Teach One applied for a Class B Bingo license in Macon County. In accordance with Amendment 744, Reach One, Teach One contracted with MCI to operate the facility. To date, there has been no grant or denial by the Defendant Sheriff of the Plaintiffs' application. Further, contrary to the Defendant's assertion that the Plaintiffs' application was incomplete, there has been no notification from the Sheriff to the Plaintiffs that the application is somehow lacking.

From the facts alleged by the Plaintiffs, one can reasonably infer that the Sheriff has made intentional efforts to treat the Plaintiffs differently from others – specifically the only Class B Bingo licensed facility owners and licensees that are currently in operation in Macon County. The Sheriff's actions have violated the Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment of the United States Constitution. Furthermore, the Sheriff's actions have caused the Plaintiffs injury which is actual and appropriate to be remedied by this Court.

ARGUMENT

I. MCI HAS PROPER STANDING TO ASSERT ITS CLAIMS AGAINST THE DEFENDANT SHERIFF

A plaintiff shows that he has standing by demonstrating that " 1) that he has suffered an actual or threatened injury, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable ruling." *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994). Further, the plaintiff must demonstrate that he has an interest that is legally protected "by statute or otherwise." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 980-81 (11th Cir. 2005) (quoting *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1882 (11th Cir. 1993). Under this framework, MCI can show that it has proper standing.

The right to conduct bingo gaming in Macon County is an interest which is legally protected by Amendment 744 to the Constitution of Alabama. Although the Amendment speaks to non-profit organization being granted a Class B Bingo License, the Defendant Sheriff's promulgated rules regarding bingo gaming in Macon County and the application for a Class B Bingo License effectively extend these rights to for-profit organizations. which may operate the games on the non-profit organizations behalf or which may act as a surety or guarantor for the games. The Original Rules, the First Amended Rules and the Second Amended Rules would all allow "a nonprofit organization [to] enter into a contract with any individual, firm, association or corporation to have the individual or entity operate bingo games ... on behalf of the nonprofit organization." The Application for Bingo Gaming in Macon County provides a space for the identification of the person or entity which will operate or promote the bingo gaming as well as the identification of the guarantor or surety of the bingo games.

Reach One, Teach One is listed on the application as the non-profit organization to hold the Class B Bingo License and MCI is listed on the application as an entity which will act as a surety for the games and MCI's officers are listed as persons who will operate or promote bingo gaming. (Complaint ¶ 15). The Defendant Sheriff's amendment of the rules to intentionally provide for a bingo monopoly in Macon County injures Reach One, Teach One as well as MCI as the designated operator of the bingo gaming. A favorable court ruling would eliminate this monopoly and also end the day-to-day losses being suffered by Reach One, Teach One and MCI.

III. THE DEFENDANT'S ARGUMENTS THAT THE PLAINTIFFS' CLAIMS ARE NOT RIPE AND ARE MOOT ARE INCONSISTENT AND MISPLACED

The Defendant asserts that this Court lacks jurisdiction over the Plaintiffs claims because 1) the claims are not ripe, and 2) the claims are moot. The doctrine of ripeness proposes that a claim should be dismissed because it is premature. *Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (quoting *Digital Prop., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). Whereas the doctrine of mootness proposes that a claim should be dismissed because it is no longer active. *Adler v. Duvall County Sch. Bd.*, 121 F.3d 1475, 1477. A claim cannot be both "unripe" and moot or rather premature and overly mature. For the Defendant to make such an argument against the Plaintiffs' equal protection claims is inconsistent.

A. THE PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

1. The absence of a final decision from the Defendant Sheriff does not dismiss this claim for lack of ripeness

The Defendant Sheriff claims that MCI and Reach One, Teach One's claims are not ripe because the Sheriff has not issued a final decision regarding their application. The application was filed in June 2005 – almost one year ago, yet the Defendant, by no fault of the Plaintiffs, has failed to issue a response. His delay cannot then be used as justification to his argument that the Plaintiffs' claims are not ripe.

In *Florida Cannabis Action Network v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1367 (M.D. Fla. 2001), the Court evaluated a First Amendment claim brought by a plaintiff who applied for a "festival permit".[1] The application did not become complete under administrative definitions of the granting authority until the Sheriff and the Public Health Officer gave their approval to the application. The granting authority is then given twenty days to approve the "completed application" after the approval of the Sheriff and the Public Health Officer is obtained. The Sheriff and the Public Health Officer never gave their approval, and the local ordinance did not require them to give an approval within a certain time limit thereby preventing the application from review of the final granting authority. The Court held that the failure to issue a final decision and the lack of a time frame to issue a final decision violated First Amendment protections. *Florida Cannabis*, 130 F. Supp. 2d at 1367-68.

Likewise, the Sheriff's failure here to act upon the Plaintiffs' application for over a year with no stated time to act upon the application should not bar the Plaintiffs from pursuing their Equal Protection claim. Further, the Sheriff's extended period of silence regarding the application can be reasonably taken as a denial because the Plaintiffs cannot effectively and legally operate a Class B bingo facility without first being granted a license. These acts or rather the failure to act by the Defendant Sheriff constitutes an ongoing violation of the Plaintiffs' Fourteenth Amendment protections.

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[1]Although the Plaintiffs note that the framework for a First Amendment claim and a Fourteenth Amendment Equal Protection Claim are different; however, the analysis regarding the effect of delay on the judicial review appears reasonably similar.

2. The Plaintiffs claims are fit for adjudication and denial of judicial review would result in hardship

In determining whether a claim is ripe, Courts have applied the fitness and hardship test. *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670, 140 L. Ed. 2d 921 (1998), *see also Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 13-14, 120 S. Ct. 1084, 1093, 146 L. Ed. 2d (2000). The fitness and hardship test involves the following factors: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. *Ohio Forestry*, 118 S. Ct. at 1670. The Plaintiffs' claims are ripe as they meet the prongs of the fitness and hardship test.

Delayed review of the Plaintiffs' equal protection claim would only cause greater loss to the Plaintiffs. As stated in the Plaintiffs' First Amended Complaint, the Plaintiffs have already purchased land for the facility, began construction for the facility and has negotiated financing for the machines. (Complaint at ¶ 19). The longer that this issue remains unresolved, business reputation, goodwill and income will diminish, and the future of the public service goals of the Plaintiffs' MCI/Reach One, Teach One venture are threatened.

Judicial intervention will not interfere with any further administrative action. Currently, there are no further administrative actions being undertaken by the Defendant Sheriff in regards to the Plaintiffs' application. Further, the Defendant Sheriff has shown by his unreasonable delay that he has no intention of taking any action regarding the Plaintiffs' application. As such, the only actions that Plaintiffs may now seek are judicial in nature as opposed to administrative.

The Court would benefit from the further development of issues presented in this case. The Plaintiffs' claims involve serious allegations of the denial of equal protection pursuant to the Fourteenth Amendment of the United States Constitution. The Plaintiffs have sufficiently pled this claim; however, discovery would better bring the merits of the Plaintiffs' claims to light. Specifically, the history of bingo gaming of Macon County and the relationship between the Defendant Sheriff and the owner(s) of the sole Class B licensed facility in the County will show that this case goes beyond whether a license will or will not be granted. Instead, this case involves a planned effort to exclude other Class B bingo facilities not for any health, economic or safety issues, but for singular motivations.

B. THE PLAINTIFFS' CLAIMS ARE NOT MOOT

A claim is only moot when the issues have been resolved, and there is no active case or controversy. *Adler*, 121 F.3d at 1477. Such is not the situation in the instant case. The Plaintiffs' application is still outstanding. The Defendant Sheriff's Amended Rules are still in effect. These rules as stated earlier have an effect of treating applicants differently. Specifically, the Plaintiffs have been treated differently from the operator(s) of the current and only licensed Class B bingo facility in Macon County. This differential treatment is not rationally based upon a legitimate concern. Instead, the rationale is couched in vague and unfounded terms to hide the animus behind the subsequent changes of the Original Rules.

The Defendant Sheriff argues that because the Plaintiffs have alleged that the Defendant gave verbal assurances that their application would be granted, the Plaintiffs' claims are moot. However, the Plaintiffs cannot operate a Class B bingo facility with verbal assurances. Further, these assurances have not changed the discriminatory rules that are in place. Until the Original Rules are reinstated and the Plaintiffs are treated in the same manner as the other license holder(s), the Plaintiffs' claims are still live and active.

WHEREFORE, PREMISES CONSIDERED the Plaintiffs respectfully request that this Court deny the Defendant's Motion to Dismiss.

Respectfully Submitted,

/s/ Ramadanah M. Salaam-Jones
KENNETH L. THOMAS (THO 043)
RAMADANAH M. SALAAM-JONES (SAL 026)

OF COUNSEL:
THOMAS, MEANS, GILLIS & SEAY
3121 Zelda Court (36106)
P.O. Box 5058
Montgomery, Alabama 36103-5058
(334) 270-1033 (phone)
(334) 260-9396 (fax)

GARY A. GRASSO
ADAM R. BOWERS

OF COUNSEL:
GRASSO DUNLEAVY, P.C.
7020 County Line Road
Suite 100
Burr Ridge, Illinois 60527
(630) 654-4500 (phone)
(630) 355-4646 (fax)

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 15th day of August, 2006.

Fred D. Gray
Fred D. Gray, Jr.
GRAY, LANGFORD, SAPP,
MCGOWAN, GRAY & NATHANSON
P.O. Box 830239
Tuskegee, Alabama 36083-0239
(334) 727-4830 (phone)
(334) 727-5877 (fax)

/s/ Ramadanah M. Salaam-Jones
OF COUNSEL